

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

2520 Venture Oaks, Suite 350
Sacramento, CA 95833
(916) 274-5721
FAX (916) 274-5743
www.dir.ca.gov/oshsb



Attachment No. 2

INITIAL STATEMENT OF REASONS**CALIFORNIA CODE OF REGULATIONS**

TITLE 8: Chapter 4, Subchapter 4, Article 4, Sections 1532, 1532.1, and 1535 of the Construction Safety Orders; and Subchapter 7, Article 9, Sections 5198, 5200, 5201, 5207, 5211, 5214, 5218, and 5220 of the General Industry Safety Orders

Medical Evaluations for Respirator Users**SUMMARY**

This proposal was developed by the Division of Occupational Safety and Health (Division) in response to a Form 9, Request for New, or Change in Existing, Safety Order, submitted by the Enforcement Unit. The proposal amends the general requirements of eleven substance-specific standards to make the requirements for the use of respiratory equipment consistent with the corresponding requirements of Title 8, California Code of Regulations, Section 5144(e) regarding medical evaluations for employees using respirators. This subsection requires an employer to provide a medical assessment for the employee before being required to use the respirator in the workplace. The proposal would amend Sections: 1532, Cadmium; 1532.1, Lead; 1535, Methylenedianiline; 5198, Lead; 5200, Methylenedianiline; 5201, 1,3-Butadiene; 5207, Cadmium; 5211, Coke Oven Emissions; 5214, Inorganic Arsenic; 5218, Benzene; and 5220, Ethylene Oxide.

The existing California standards have the following federal equivalents in 29 Code of Federal Regulations (CFR) 1910: 1018, Inorganic arsenic; 1025, Lead; 1027, Cadmium; 1028, Benzene; 1029, Coke oven emissions; 1047, Ethylene oxide; 1050, Methylenedianiline; and 1051, 1,3-Butadiene; and 29 CFR 1926: 60, Methylenedianiline; 62, Lead; and 1127, Cadmium.

In 1998, California's existing substance-specific standards were changed in response to the adoption of Section 5144 as a result of the promulgation of the corresponding federal standard, 29 CFR 1910.134. This standard established that employees assigned to use respiratory protective equipment are required to be provided with a medical evaluation to determine the employee's ability to use a respirator. At the time of promulgation, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) did not elect to apply this same requirement to all the substance-specific standards because each standard contained a medical surveillance program requirement that OSHA believed integrated the same requirements for

evaluating respirator users^{*}. Since essentially the same regulatory language of the OSHA respirator standard was adopted in California, the same implementation was made in the California substance-specific standards. However, a Division enforcement staff's request in 2001 indicated that for some substance-specific standards, the implementation of the requirement for a medical evaluation can be delayed when the medical surveillance requirement is subject to a threshold based on the employee's exposure to specific concentrations of the substance, and after a specified number of days. The Division believes these standards need to be amended to provide the affected employees respiratory protection equal to the general industry respiratory protection standard.

SPECIFIC PURPOSE AND FACTUAL BASIS OF THE PROPOSED ACTION

This proposal is intended to establish that employers engaged in operations covered by the listed standards must provide the employees assigned to use respiratory protection with a medical evaluation designed to assess the employee's ability to use a respirator without adverse health effects. Each standard has a section for the use of respiratory protective equipment specifying the type of equipment required for each level of exposure, and the elements of the program required for the use of respirators by referring to most of the requirements specified in Section 5144, Respiratory Protection. Each of the listed standards specifically omits subsection (e), which requires a medical evaluation prior to using a respirator. Although each substance-specific standard has elements of a medical surveillance program, either the pertinent subsection lacks an appropriate evaluation for respirator use or the medical surveillance provision is only implemented after an employee has been exposed to the substance for a specific length of time. This does not afford the same protection as Section 5144(e) that requires the evaluation to be made before the employee is fit tested or required to use the respirator in the workplace.

The purpose of the proposed changes is to provide a consistent implementation of the initial medical evaluation for employees who are assigned to use respirators. Eleven substance-specific standards have medical surveillance programs that are not required to be provided in a preventive manner as they are by Section 5144. Medical surveillance for these substance-specific standards are to be implemented as follows:

Section 1532, Cadmium, does not require medical surveillance if the employee is not exposed at or above the action level for 30 or more days per year, or does not perform specified cadmium related tasks for 30 or more days per year. The necessity for the proposed revision is that the standard requires the use of respirators for such activities as the maintenance of engineering controls or emergencies that may not occur more than 30 days each year. Employees working in regulated areas are also required to use respirators. The proposed revision is needed to assure that these employees who may not be required to have medical surveillance, are given a medical evaluation to determine their ability to use a respirator without any adverse effects on their health.

Section 1532.1, Lead, requires medical surveillance for employees exposed at or above the action level for 30 or more days per year. The necessity for the proposed revision is that

^{*} Rules and Regulations, Federal Register Vol. 63, No. 5, dated Thursday, January 8, 1998.

subsection (d)(2) requires employees to wear specific types of respirators for specific ranges of exposure and types of work, before an actual airborne exposure assessment has been made, and includes all types of respirators. Since respirator usage is inherently the primary and initial means for controlling the exposure, the standard needs to assure that employees are given a medical evaluation to determine their ability to use a respirator without any adverse effects on their health.

Section 1535, Methylenedianiline, requires medical surveillance for employees exposed at or above the action level for 30 or more days per year or who have dermal contact for 15 or more days per year. The necessity for the proposed revision is that the standard requires the use of respirators for activities such as the installation of engineering controls, maintenance and repair that may not occur for more than 15 or 30 days each year. Employees working in regulated areas are also required to use respirators. The proposed revision is needed to assure that these employees who may not be required to have medical surveillance, are given a medical evaluation to determine their ability to use a respirator without any adverse health effects.

Section 5198, Lead, requires medical surveillance for “employees who are or may be exposed at or above the action level for more than 30 days per year.” This omits a medical evaluation for employees using respirators for short-term jobs or for emergencies. The necessity for the proposed amendment is that subsection (e)(1)(B) permits the use of respirators to augment engineering and work practice controls to reduce employee exposure below the PEL. Consequently, an employee can be required to use a respirator for up to 30 days without being medically evaluated to determine their ability to use a respirator without adverse health effects.

Section 5200, Methylenedianiline, requires medical surveillance for employees who are “exposed at or above the action level for 30 or more days per year.” This omits a medical evaluation for employees using respirators for short-term jobs or for emergencies. The necessity for the proposed amendment is that subsection (g)(1)(B) permits the use of respirators to augment engineering and work practice controls to reduce employee exposure below the PEL. Consequently, an employee can be required to use a respirator for up to 30 days without being medically evaluated to determine their ability to use a respirator without adverse health effects.

Section 5201, 1,3-Butadiene, establishes medical surveillance for employees exposed “at or above the action level on 30 or more days or for employees who have or may have exposure to BD at or above the PELs on 10 or more days a year”. The necessity for the proposed amendment is that subsection (f)(1)(B) permits the use of respirators to augment engineering and work practice controls to reduce employee exposure below the PEL. Consequently, an employee can be required to use a respirator for up to 30 days without being medically evaluated to determine their ability to use a respirator without adverse health effects.

Section 5211, Coke Oven Emissions, establishes medical surveillance only for employees who are exposed at the action level for 30 days or more per year. The necessity for the proposed amendment is that subsection (f)(1)(C) permits the use of respirators to augment engineering and work practice controls to reduce employee exposure below the PEL. Consequently, an employee

can be required to use a respirator for up to 30 days without being medically evaluated to determine their ability to use a respirator without adverse health effects.

Section 5214, Inorganic Arsenic, establishes medical surveillance for employees who are exposed above the action level for 30 days or more per year. The necessity for the proposed amendment is that subsection (g)(1)(B) permits the use of respirators to augment engineering and work practice controls to reduce employee exposure below the PEL. Consequently, an employee can be required to use a respirator for up to 30 days without being medically evaluated to determine their ability to use a respirator without adverse health effects.

Section 5218, Benzene, establishes medical surveillance for employees who are exposed above the action level for 30 or more days per year, or for 10 or more days if exposed above the PEL. The necessity for the proposed amendment is that subsection (f)(1)(B) permits the use of respirators to augment engineering and work practice controls to reduce employee exposure below the PEL. Consequently, an employee can be required to use a respirator for up to 30 days without being medically evaluated to determine their ability to use a respirator without adverse health effects.

The proposed change to each of these sections is intended to assure that any employee assigned to work with any of the eleven substances is given a medical evaluation to determine their ability to use a respirator, without any adverse effects on their health, before they have to wear one in an atmosphere contaminated with the substance. The proposed amendments would include in each standard, the requirement to adhere to Section 5144(e), the basic medical evaluation that is to be provided “before the employee is fit tested or required to use the respirator in the workplace.”

DOCUMENTS RELIED UPON

1. Department of Labor, Occupational Safety and Health Administration (OSHA), 29 CFR Parts 1910 and 1926, Re: Respiratory Protection; Final Rule; Federal Register, Volume 63, No. 5, Rules and Regulations, dated January 8, 1998; pages 1151, 1152, 1265-1267.
2. Division of Occupational Safety and Health, Request for New, or Change in Existing, Safety Order (Form 9), dated October 26, 2001.

REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No reasonable alternatives were identified by the Board and no reasonable alternatives identified by the Board or otherwise brought to its attention would lessen the impact on small businesses.

SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

COST ESTIMATES OF PROPOSED ACTION

Costs or Savings to State Agencies

Insignificant to no costs or savings to state agencies will result as a consequence of the proposed action.

Impact on Housing Costs

The Board has made an initial determination that this proposal will not significantly affect housing costs.

Impact on Businesses

The Board has made an initial determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

Cost Impact on Private Persons or Businesses

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under “Determination of Mandate.”

Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal does not impose any significant nondiscretionary costs or savings on local agencies.

DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed regulations do not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the proposed amendments will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore, these regulations do not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

The proposed regulations do not require local agencies to carry out the governmental function of providing services to the public. Rather, the regulations require local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, the proposed regulations do not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed regulations do not impose unique requirements on local governments. All employers - state, local and private - will be required to comply with the prescribed standard.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments may affect small businesses.

ASSESSMENT

The adoption of the proposed amendment to these regulations will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

ALTERNATIVES THAT WOULD AFFECT PRIVATE PERSONS

No reasonable alternatives have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.